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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LENNOX WINSTON PINKS,

Defendant and Appellant.

B198046

(Los Angeles County
Super. Ct. No. KA 076726)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Charles E. Horan, Judge. Affirmed.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

Lennox Winston Pinks was convicted of two counts of robbery and one count of possession of marijuana for sale. He appealed, and we reversed one robbery conviction but otherwise affirmed the judgment. After granting respondent's petition for review (*People v. Pinks*, review granted June 25, 2008, S163214), the California Supreme Court transferred the case back to this court on April 1, 2009, with instructions to vacate our decision and reconsider the matter in light of *People v. Scott* (2009) 45 Cal.4th 743. We do so and now affirm the judgment in its entirety.

BACKGROUND

The second amended information charged Pinks with two counts of second degree robbery in violation of Penal Code section 211¹ (counts 1 and 2) and one count of possession of marijuana for sale in violation of Health and Safety Code section 11359. The information further alleged that, in committing the robberies alleged in counts 1 and 2, Pinks personally used a firearm within the meaning of section 12022.53, subdivision (b).

Pinks pleaded not guilty and denied the special allegations. A jury convicted him on all counts and found the firearm allegations true. The trial court sentenced him to 13 years and 8 months in state prison, calculated as follows: the midterm of 3 years, plus 10 years for the firearm enhancement, on each of counts 1 and 2, the sentences to run concurrently; plus the midterm of 8 months on count 3, to run consecutively.

The evidence showed that in the evening of October 5, 2006, Pinks entered a convenience store carrying a gun. Pinks pointed the gun first at the box boy and then at the cashier, and he demanded money from the cashier. The cashier initially refused Pinks' demand but ultimately complied and opened the cash register drawer, from which Pinks took \$120 to \$130. The box boy phoned the owner of the store and informed him of the robbery, and the owner called the police.

¹ All subsequent statutory references are to the Penal Code unless otherwise indicated.

Pinks was apprehended less than one week later. In custody, he initially denied involvement in the robbery but later admitted it after being shown footage from a surveillance camera, and he said that he had used a pellet gun or BB gun in the robbery. At trial, the cashier testified that he had observed the gun closely, and it appeared to be a “real gun.”

DISCUSSION

I. Duty to Instruct on Lesser Included Enhancements

The trial court instructed the jury on the sentencing enhancement for personal use of a firearm. Pinks argues that the trial court had a duty to instruct the jury *sua sponte* concerning the lesser included enhancement for personal use of a deadly or dangerous weapon because the record contained substantial evidence that Pinks used a pellet gun or BB gun, which is a deadly or dangerous weapon but not a firearm. We disagree because, as a matter of law, the trial court has no duty to instruct the jury *sua sponte* on lesser included enhancements.

In *People v. Majors* (1998) 18 Cal.4th 385, the California Supreme Court held that “a trial court’s *sua sponte* obligation to instruct on lesser included offenses does not encompass an obligation to instruct on ‘lesser included enhancements.’” (*Id.* at p. 411.) Pinks argues that we are not bound by that case, however, because it was implicitly overruled by the United States Supreme Court’s statement in *Apprendi v. New Jersey* (2000) 530 U.S. 466, that a “‘sentence enhancement’ . . . is the functional equivalent of an element of a greater offense.” (*Id.* at p. 494, fn. 19.) The argument fails because the statement in *Apprendi* means only that, *for purposes of the due process requirement that every fact which increases the maximum penalty to which the defendant is exposed must be found by a jury beyond a reasonable doubt*, a sentence enhancement is the functional equivalent of an element of a greater offense. *Apprendi* had nothing to do with a court’s *sua sponte* obligation to instruct on lesser included offenses or lesser included enhancements. *Apprendi* therefore did not overrule the California Supreme Court’s

holding that trial courts have no sua sponte obligation to instruct on lesser included enhancements.

The two other cases on which Pinks relies are likewise inapposite. *People v. Breverman* (1998) 19 Cal.4th at pages 148-149, dealt only with the sua sponte obligation to instruct on lesser included offenses, not lesser included enhancements. We consequently cannot agree with Pinks' suggestion that *Breverman* implicitly overruled *People v. Majors*, *supra*, 18 Cal.4th 385, which was decided only a few months earlier. Pinks' reliance on *People v. Sengpadychith* (2001) 26 Cal.4th 316, too is misplaced, because that case did not deal with the sua sponte obligation to instruct on lesser included offenses *or* lesser included enhancements.

For all of these reasons, we reject Pinks' argument that the trial court had a duty to instruct the jury sua sponte concerning the lesser included enhancement for personal use of a deadly or dangerous weapon.

II. Waiver of Other Claim of Instructional Error

Pinks argues that the trial court erred by failing to instruct the jury on the definition of a BB gun. We conclude that Pinks has forfeited this claim by failing to raise it in the trial court.

“[T]he trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case.” (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.) At the same time, however, “[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

Pinks did not request a clarifying instruction concerning the definition of a BB gun, so he has waived the issue unless he can demonstrate that the instructions given were not “correct in law.” (*People v. Lang*, *supra*, 49 Cal.3d at p. 1024.) He cannot. The trial court instructed the jury on the definition of a firearm. The instruction was

correct and adequate as given, because it correctly informed the jury of the facts the jury needed to find in order to find that the weapon Pinks used was a firearm within the meaning of the enhancement. Pinks' failure to request additional clarifying instructions "bars appellate review of the issue" on direct appeal. (*People v. Johnson* (1993) 6 Cal.4th 1, 52.)

III. Constructive Possession

Pinks argues that his conviction for robbery of the box boy must be reversed because (1) the box boy's status as an employee of the store is not, in itself, sufficient to prove that the box boy had constructive possession of the cash that Pinks took, and (2) the record contains no other evidence that is sufficient to support a finding of constructive possession. The argument fails because "all employees on duty during a robbery have constructive possession of their employer's property." (*People v. Scott, supra*, 45 Cal.4th at p. 746.)

DISPOSITION

Our previous opinion in this case filed on March 27, 2008, is vacated. The judgment is affirmed.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JACKSON, J.*

* Associate Justice of the Court of Appeal, Second Appellate District, Division Seven, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.